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In the Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE DANIEL CALDWELL (A/K/A THOMAS E. MORGAN), AND EROS A. TIMM,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A1-A70), as amended (Pet. App. A71-A74), is unreported. The supplemental opinion of the panel on petition for rehearing (Pet. App. A75-A80) and Chief Judge Bazelon's statement in support of his vote to grant the suggestion for rehearing *en banc* (Pet. App. A81-A86) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1974. On September 23, 1975, the court denied the petition for rehearing or rehearing *en banc*. The petition for a writ of certiorari was filed on October 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law.

24 D.C. Code 301(j) (1973) provides in pertinent part:

> No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

QUESTION PRESENTED

Whether 24 D.C. Code 301(j), providing that in order for an insanity defense to prevail the defendant must show his mental incapacity by a preponderance of the evidence, denies the accused due process of law.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of a total of fifteen counts charging the

commission of federal and District of Columbia offenses, including murder, bank robbery and armed robbery.[1] Petitioners were sentenced to serve multiple terms of imprisonment up to life, the sentences in all but two instances to be served concurrently.[2]

A panel of the court of appeals, with one judge concurring in part and dissenting in part, vacated the convictions on all the federal counts and affirmed the majority of the non-federal convictions and the

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[1] Counts 1, 7, and 11 charged the commission of federal bank robbery, in violation of 18 U.S.C. 2113 (both petitioners).

Counts 2, 8, and 12 charged armed robbery, in violation of 22 D.C. Code 2901 and 3202 (both petitioners).

Counts 4, 10, and 14 charged assault with a dangerous weapon, in violation of 22 D.C. Code 502 (both petitioners).

Counts 5 and 18 charged carrying a pistol without a license, in violation of 22 D.C. Code 3204 (Timm).

Count 6 charged felony murder, in violation of 22 D.C. Code 2401 (both petitioners).

Counts 15 and 16 charged violations of the federal firearms statutes, 26 U.S.C. 5861(d), (i) and 5871 (both petitioners).

Count 17 charged carrying a pistol without a license, in violation of 22 D.C. Code 3204 (Caldwell).

The jury did not return verdicts on Counts 3, 9, and 13 which charged robbery, since they had returned guilty verdicts on the corresponding charges of armed robbery.

[2] On Counts 2, 8, and 12, five to fifteen years' imprisonment (both petitioners).

On Counts 5 and 18, one year's imprisonment (Timm).

On Count 6, for felony murder, life imprisonment (both petitioners).

On Count 17, one year's imprisonment (Caldwell).

Convictions on all other counts—including those on Counts 7 and 11, which were made to run consecutive to the sentence on Count 1—were reversed on appeal.

sentences imposed thereon (Pet. App. A66-A68). The panel denied rehearing, concluding (Pet. App. A75-A80) that the intervening decision in *Mullaney* v. *Wilbur*, 421 U.S. 684, did not require a different result.

1. The evidence at trial showed that on May 24, 1971, petitioners robbed a savings and loan association and that on May 25, 1971, they robbed another savings and loan association and killed a police officer.

As petitioners attempted to make their escape from the second robbery, they were ordered to halt by District of Columbia Metropolitan Police Officer William L. Sigmon, who had been summoned by the bank's manager (V Tr. 960-962, 973-974, 989).[3] Petitioners fled, Caldwell firing as he ran (V Tr. 1023). Timm went behind Officer Sigmon, who was then crouched against a retaining wall to avoid Caldwell's fire and was unaware of Timm's approach. At point blank range Timm shot Sigmon in the back, killing him (V Tr. 1393, 1029, 1038, 1053). Several witnesses observed the shooting and described Timm as the killer (V Tr. 1008-1010, 1025, 1040, 1047). A ballistics expert identified the fatal bullet as coming from Timm's gun (VII Tr. 1475).

Petitioners escaped in a blue-panelled truck, identified by a witness as belonging to Timm (VI Tr. 1117-1122). Several hours later, the truck was spotted by police officers who stopped it, identified petitioners as the suspects and arrested them (VI Tr. 1175-

[3] References throughout this brief are to the volume number and page of the transcript.

1179). A search of the truck revealed evidence incriminating petitioners in the robberies (IV Tr. 768, 814; V Tr. 937, 929, 981; VIII Tr. 1484-1492; V Tr. 927, 976, 983; VI Tr. 1252-1254, 1256-1260).

At trial, several tellers from the two robbed banks testified that they had given detailed descriptions of the robbers to police and that the descriptions fit petitioners; the witnesses positively identified petitioners in lineups and at trial as the perpetrators of the robberies (IV Tr. 769-771, 807-808, 815; V Tr. 929-930, 937-938, 1023-1024, 1067-1068). Photographs taken during the second bank robbery confirmed the descriptions given by the tellers and showed the disguises utilized by petitioners (V Tr. 934, 940, 987-990).

2. Petitioners' defense was insanity, and the district court instructed the jury pursuant to 24 D.C. Code 301(j) that, in order to prevail on that defense, petitioners were required to prove their mental incapacity by a preponderance of the evidence.[4]

Petitioner Caldwell called as witnesses several of his friends who testified that they had known him to do strange things (VIII Tr. 1341-1342, 1544-1546). On cross-examination, however, each admitted that Caldwell was intelligent, articulate, and very reflec-

[4] Prior to arraignment, each petitioner underwent court-ordered psychiatric examination at St. Elizabeths Hospital. Following the mental examinations and a hearing before the district court, both petitioners were found competent to stand trial.

tive (VIII Tr. 1556-1558; IX Tr. 1606, 1610-1611, 1616-1618).[5]

Dr. Alec J. Whyte, a defense expert, testified that Caldwell was suffering from a hysterical personality disorder that seriously diminished his capacity to understand what he was doing on the days of the robberies (IX Tr. 1622, 1752). Dr. Whyte based his opinion on Caldwell's history and on the fact that during the interviews with him, Caldwell was unresponsive (IX Tr. 1680). On cross-examination, Dr. Whyte admitted that Caldwell's symptoms did not conform with the more traditional definition of the hysterical personality that he had diagnosed Caldwell as having (IX Tr. 1637-1638).[6]

Petitioner Timm also called friends to testify as to his background and expert witnesses to testify that he was suffering from schizophrenia (X Tr. 1838, 1903-1904, 1944-1946, 1963-1970; XI Tr. 1983, 1985, 2057). One expert, Dr. Carl Bauer, characterized Timm as suspicious, seclusive and dependent (all characteristics of schizophrenia), but he found evidence of malingering and the attempted manipulation of test results to avoid incarceration (XII Tr. 2334-2336, 2351-2352). Another expert, Dr. Jonas Rappeport, conceded on cross-examination that he had not examined Timm until six months after the crimes charged and stated that Timm did know right from wrong and specifically knew that it was wrong to stick a gun in someone's face and shoot someone in the back (XI Tr. 2662-2663). The final question and answer on Rappeport's cross-examination were (XII Tr. 2255):

> Q. What manifestations or symptons of schizophrenia or other mental illness, based on all the evidence that has been presented to you, and the facts, did he [Timm] display on May 24 and May 25, assuming that he was the one that committed the offense?
>
> A. I haven't seen any specific evidence to indicate any specific symptoms by anybody that he displayed on those dates.

In rebuttal, the government produced several persons who had observed petitioner Caldwell in the months before and after the robberies: Caldwell's last employer, an officer who rode with Caldwell to police headquarters, a patient at St. Elizabeths Hospital who had observed Caldwell in his allegedly nonresponsive state, and members of the medical staff at the hospital. Each testified that Caldwell exhibited no symptoms of abnormal behavior (XIV Tr. 2720, 2734-2735, 2781-2783). Dr. Elizabeth Straw-

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[5] For example, Fred Lewis, a former roommate of Caldwell, testified that Caldwell had strong ideas about right and wrong, would be guided by the right and was intelligent enough to make his own choices; Caldwell knew that being a draft dodger was against the law and took precautions, such as changing his name, not to get caught (VIII Tr. 1556-1558, 1561, 1567, 1571-1572, 1574-1575).

[6] Dr. Whyte was unwilling to modify his diagnosis even when asked about a letter that he was asked to assume Caldwell had written to a friend while in his alleged unresponsive state; in the letter, Caldwell requested drugs so that he could pass his "head test with flying colors" (IX Tr. 1721-1730). The letter was later introduced by the government in its rebuttal (XIV Tr. 2697).

insky, a staff psychiatrist at St. Elizabeths, explained that Caldwell's anti-social behavior was willful, as was his non-responsive state (XIV Tr. 2720, 2727-2728). Dr. John Cavannagh, a psychiatrist and author on psychiatry, agreed with the observations of Dr. Strawinsky, finding that Caldwell had no psychosis or personality or hysterical personality disorder (XVI Tr. 2904-2906, 2909, 2920-2921). Both Dr. Strawinsky and Dr. Cavannagh testified that the elaborate planning and the complexity of the scheme involved in each robbery were inconsistent with any mental illness in Caldwell (XIV Tr. 2734-2735; XVI Tr. 2920-2921).

With respect to petitioner Timm, Dr. Strawinsky, who directed the St. Elizabeths' staff conference on Timm, stated that Timm was an inadequate personality but was not mentally ill (XVII Tr. 3117; XVI Tr. 2953-2955). She rejected the possibility that Timm was a depersonalized schizophrenic (XVI Tr. 2972-2974) and said that he was too responsive to the staff conference to be suffering from schizophrenia (XVI Tr. 2957-2961). Dr. George Weickhardt, a specialist in psychiatry and neurology, testified that he found Timm to be feigning mental illness and that Timm was healthy enough to have been able to control his behavior at the time of the robberies (XVII Tr. 2175, 3188). Both Dr. Strawinsky and Dr. Weickhardt testified that the highly organized, carefully planned and coordinated behavior involved in the robberies was not consistent with mental illness (XVI Tr. 2971-2974; XVII Tr. 3183, 3185-3186; XVIII Tr. 3206-3210).

ARGUMENT

Petitioners claim that 24 D.C. Code 301(j), which requires that a defendant establish insanity by a preponderance of the evidence, violates the Due Process Clause of the Fifth Amendment because it unconstitutionally shifts to the defendant the burden of proof and is therefore inconsistent with *In re Winship*, 397 U.S. 358, and *Mullaney* v. *Wilbur*, 421 U.S. 684.

1. It has long been established that there is a presumption of sanity and that the prosecution does not have an initial obligation to present evidence that a defendant is sane. See Goldstein, *The Insanity Defense* 106 (1967). The presumption, however, is not conclusive, and courts have required different levels of proof to rebut it.

In 1895 this Court established the rule for federal criminal cases that the accused must "produce some evidence that will impair or weaken the force of the legal presumption," after which the prosecution has the burden of proving the defendant sane beyond a reasonable doubt. *Davis* v. *United States*, 160 U.S. 469, 486. *Davis* was not, however, a constitutional holding, as this Court made clear in *Leland* v. *Oregon*, 343 U.S. 790, in upholding an Oregon statute that required the defendant to establish insanity beyond a reasonable doubt.[7]

Indeed, as Mr. Justice Marshall made clear in his plurality opinion in *Powell* v. *Texas*, 392 U.S. 514,

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[7] *Leland* expressly recognized that the rule in *Davis* was not constitutionally required (343 U.S. at 797) and permitted state diversity on the issue (*id.* at 798-799).

536, judgments concerning the doctrines of insanity, *mens rea*[8] and related principles are basically policy determinations; as such, they are "the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." Thus, to formulate a constitutional rule in these areas, he continued (*id.* at 536-537):

> would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Consistent with this recognition of the value of diverse approaches with regard to the doctrines of *mens rea* and insanity, there is no uniform rule governing the invocation of the insanity defense and, as we have noted, none is constitutionally required. Compare *Davis* v. *United States*, *supra*, and *Leland* v. *Oregon*, *supra*. The preponderance of evidence rule embodied in 24 D.C. Code 301(j)[9] is the

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[8] Petitioners expressly rely on principles relating to the doctrine of *mens rea* and state (Pet. 7): "While *mens rea* and insanity may represent independent inquiries in a criminal trial, both inquiries go to the question of culpability."

[9] Before the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91-358, Title II, Section 207(6), 84 Stat. 602), which took effect on February 1, 1971, the evidentiary rule utilized in the District

prevailing rule in twenty jurisdictions. See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 73 (1970).[10] In

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of Columbia was that promulgated in *Davis*. The change effected by Congress was in response to the decision in *Bolton* v. *Harris*, 395 F.2d 642 (C.A.D.C.). In *Bolton*, the court of appeals held that a defendant found not guilty by reason of insanity because the government had not proven his sanity beyond a reasonable doubt nonetheless could not be committed to a mental institution unless at a civil commitment hearing it was established by a preponderance of the evidence that the defendant was insane. This was perceived by the Congress as an anomalous situation in which a defendant might successfully secure acquittal on the grounds of insanity and then obtain complete release because the government could not prove his insanity by a preponderance of the evidence. As stated in the House Report on the Court Reform Act:

> This ruling [*Bolton* v. *Harris*, 395 F.2d 642 (C.A. D.C.)] permits dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which, as now Chief Justice Burger explained in rejecting such an outcome in *Overholser* v. *O'Beirne*, [302 F.2d 852, 861 (C.A. D.C.)], allows defendants "to have it both ways"—to escape both conviction and commitment to a hospital.
>
> The Committee considers the result intolerable. It neither protects the public safety nor provides treatment for a defendant acquitted of a crime on grounds of insanity.

H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 73-75 (1970).

[10] These jurisdictions adopted the rule from English practices existing at least as long ago as *M'Naghten's Case*, 8 Eng. Rep. 718, in 1843. Indeed, England still follows the *M'Naghten* rule, as do Canada and Ireland. See 9 Wigmore, *Evidence*, § 2501, n. 1 (Supp. 1970). That the practice is that

this setting, we submit that the requirement of 24 D.C. Code 301(j), that a defendant establish insanity by a preponderance of the evidence, is a reasonable legislative judgment as to the myriad factors involved in the insanity defense and is consistent with principles of fairness. The statute presents no issue of constitutional magnitude warranting review by this Court.

2. Petitioners contend, however, that *In re Winship*, *supra*, and *Mullaney* v. *Wilbur*, *supra*, have effectively overruled *Leland* v. *Oregon* and require the conclusion that the District of Columbia's insanity statute is unconstitutional.

Winship involved the standard of proof constitutionally required in juvenile proceedings. The Court extended to such proceedings the principle that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt

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prevalent among modern civilized nations and in this country significantly undermines the argument that it offends fundamental notions of justice. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548; *Leland* v. *Oregon*, *supra*, 343 U.S. at 798. For "it requires a strong showing to upset this settled practice * * * on constitutional grounds." *McGautha* v. *California*, 402 U.S. 183, 203.

With respect to diversity of procedure on the issue of burden of proof in insanity cases, see, *e.g.*, *Earp* v. *Cupp*, 453 F.2d 378 (C.A. 9), certiorari denied, 409 U.S. 868; *Timmons* v. *Peyton*, 360 F.2d 327 (C.A. 4), certiorari denied, 385 U.S. 960; *Commonwealth* v. *Vogel*, 440 Pa. 1, 268 A.2d 89; *Commonwealth* v. *Zlatovich*, 440 Pa. 388, 269 A.2d 469; *People* v. *Rizer*, 10 Cal. App. 3d 259, 88 Cal. Rptr. 773; *State* v. *Canaday*, 79 Wash. 2d 647, 488 P.2d 1064.

of every fact necessary to constitute the crime with which he is charged" (397 U.S. at 364).

Mullaney involved the question whether the state or the accused should have the burden of establishing that a homicide was committed in the heat of passion on sudden provocation, thus reducing the offense from murder to manslaughter. Maine placed this burden on the defendant, requiring that he prove "by a fair preponderance of the evidence that he acted in the heat of passion" (421 U.S. at 686). This Court pointed out how central the existence of the heat of passion was to the elements necessary to prove the different degrees of homicide and concluded (*id.* at 696):

> [T]he fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.[11]

Thus, in both *Winship* and *Mullaney*, the statute declared unconstitutional involved the burden of proof of the elements of the offense. In *Winship*, the government had a reduced burden of proof on the facts constituting the crime charged. In *Mullaney*, the de-

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[11] As we have pointed out, *supra*, pp. 10-11 and n. 10 there is no such "trend" in the case of insanity, where twenty states have statutes like that at issue here.

fense had the burden of proving the "element of intent," because malice aforethought (an element of the offense of murder) was presumed unless the defendant proved that he acted in the heat of passion on sudden provocation (thus reducing murder to manslaughter) (421 U.S. at 700-702).

The issue here involves very different considerations and a wholly different analysis, because sanity is not an element of any offense that the government is required to prove. Rather, the issue of insanity (once raised) is an affirmative defense, coming into play only after the government has proved all the elements of the offense beyond a reasonable doubt. It does not negative any of the essential elements of the crime itself; rather the essence of the insanity defense is that the accused is not responsible for the acts the government has already proved he has done. Putting the burden on the defendant in this context does no violence to the principles of *Winship* and *Mullaney*. See *Leland* v. *Oregon*, *supra*, 343 U.S. at 795-796. As the District of Columbia Circuit has stated previously with regard to 24 D.C. Code 301(j):

> [S]ince sanity is not one of the elements of felony murder but lack of sanity may be interposed as a defense, Congress may with propriety enunciate the standard of proof required of the party asserting this affirmative defense, i.e., proof by a preponderance of the evidence. That is the situation, at least unless and until *Leland* is overruled. [*United States* v. *Greene*, 489 F.2d 1145, 1155 (C.A.D.C.), certiorari denied, 419 U.S. 977.]

This theme was emphasized by Mr. Justice Rehnquist in his concurring opinion in *Mullaney* v. *Wilbur*, *supra*, 421 U.S. at 705, who saw "no inconsistency" between *In re Winship* and *Leland* v. *Oregon* because (421 U.S. at 705-706):

> The Court noted in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea* if any required by state law, had been proven beyond a reasonable doubt. *Id.*, at 792, 795. Although as the state court's instructions in *Leland* recognized, *id.*, at 794-795, evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof on insanity on Leland, unlike Maine's redefinition of homicide in the instant case, did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense. *Id.*, at 795. * * * Having once met that rigorous burden of proof [beyond a reasonable doubt] that, for example, in a case such as this, the defendant not only killed a fellow human being, but did it with

malice aforethought, the State could quite consistently with such a constitutional principle conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue.[12]

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[12] Petitioners urge (Pet. 9, n. 4) that if the Court grants their petition, it should also consider "whether Congress may place the burden of proving insanity upon the defense with respect to violations of the District of Columbia Code while leaving the rule of *Davis* v. *United States, supra,* undisturbed with respect to similar crimes covered by the United States Code, or whether this Congressional action denies equal protection of the laws." This argument was fully answered in *United States* v. *Greene, supra,* 489 F.2d at 1153:

> In enacting local criminal statutes in the exercise of its singular constitutional responsibility to legislate for the District, Congress need not hew to the same path it elects in defining criminal offenses of nationwide applicability, pursuant to its Federal legislative powers. Thus viewed, we find no inconsistency whatever in applying to a D.C. Code offense—albeit tried in the United States District Court—a standard of proof different from that of a Federal offense tried, for example, in the District Court for the Southern District of New York. Indeed, it would be more anomalous for one standard, at least of a substantive or crucial nature, to be applied when a D.C. Code offense is tried in the Superior Court and another when the same offense is tried in the District Court. Section 207(6) [24 D.C. Code 301(j)] obviates this by providing that a single rule of insanity shall apply to all D.C. Code offenses, regardless of the tribunal before which they are tried. We cannot accept appellant's suggestion that this works a denial of the equal protection of the laws.

See also *Johnson* v. *United States,* 225 U.S. 405, 411-419; *Griffin* v. *United States,* 336 U.S. 704, 712-713; *United States* v. *Thompson,* 452 F.2d 1333, 1338 (C.A.D.C.); cf. *Palmore* v. *United States,* 411 U.S. 389.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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